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Choo Oh Kim & Ors v Mok Yuen Lok & Ors (Naza Properties Sdn Bhd, Intervener)

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HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–578 OF 2000
MOHD NOOR ABDULLAH J
25 APRIL 2005

C

Land Law — Sale of land — Consideration, adequacy of — Sale of land below market price — Action against special administrators appointed by Pengurusan Danaharta Nasional Berhad — Duty of care owed by special administrators to act in good faith — Assessment of true value of property — Whether wilful misconduct or gross negligence on the part of special administrators in discharging duty — Pengurusan Danaharta Nasional Berhad Act 1998 ss 4(1), 25, 66(1), 66(2) & 71

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The third plaintiff had obtained credit facilities of RM5 million from Malayan Banking Bhd for the purpose of building a hotel on a piece of land, pursuant to which the land and hotel ('the property') was charged to the bank as security. The third plaintiff's subsequent failure to repay the loan rendered the charge vested in the third defendant ('Danaharta'). The plaintiffs had earlier entered into a sale and purchase agreement ('SPA') with a purchaser over the shares in the third plaintiff for which they had procured three separate valuation reports of the property which assessed the value at RM42 million, RM43 million and RM43 million respectively. On 12 July 2000, the first and second plaintiffs granted an unconditional banker's guarantee over the property. In order to complete the sale, the purchaser was required to furnish an unconditional bank guarantee within 30 days from 12 July 2000 but the purchaser failed to do so and the SPA was ultimately aborted on the 12 August 2000. On the 24 July 2000 Danaharta had appointed the first and second defendants as special administrators ('the SA') over the third plaintiff. The SA procured a valuation report of the property wherein the value was assessed at RM16.3 million and RM19.8 million. The SA subsequently advertised a sale by tender of the property from 11 October 2000 to 15 November 2000. It transpired that the first and second plaintiffs had applied for an extension of time to complete their SPA transaction from the SA who rejected the application. The SA proceeded with the tender exercised by accepting the highest bid of RM15 million from Naza Properties Sdn Bhd, the Intervener to this civil suit, and subsequently completed the sale. The plaintiffs brought an action against Danaharta and the SA for damages and for losses incurred.

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Held, allowing the plaintiff's application:

(1) The Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act') imposed a duty to act in good faith on the part of the defendants in the discharge of their duties (s 71 of the Act). The duty of the first and second defendants in their capacity as special administrators were akin to the duty owed by

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a mortgagee to the mortgager of the property to act in good faith for the specific purpose of enabling the assets comprised in the security for the debt to be preserved and realised for the purpose of obtaining repayment of the debt (see para 41); *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] 3 All ER 626 followed. Further, the mortgagee had a narrow duty to take reasonable precautions to obtain the true value of the property at the time of sale and was required to act in good faith but unless there was evidence of deliberate or wilful misconduct on the part of the mortgagor, the duty to take reasonable precaution would not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost or effort (see para 42). Whenever an authority was vested with absolute power, that authority must exercise the power with restraint because the courts were jealous of absolute power being exercised absolutely (see para 45).

(2) The Act did not derogate from the entrenched proprietary right of a person that he should not be deprived of his property save in accordance with the law. (see para 34).

(3) The defendants were accorded immunity from civil suits provided that there had been no wilful misconduct or gross negligence in the discharge of their duties (see para 33).

(4) By ignoring the valuation reports procured by the plaintiffs, withholding consent for the extension of time for the plaintiffs' sale and purchase agreement, accepting the tender bid of RM15 million as the sale price for the tender, and further securing the payment of fees for estate agents, solicitors and for their own services, the special administrators had acted dishonestly and shown total disregard for and wilfully caused consequential loss to the plaintiffs. The facts cumulatively show the special administrators' wilful and gross negligence bordering on fraud against the plaintiffs and therefore the defendants were liable to the plaintiffs (see para 43).

(5) The amount of damages liable to be paid by the defendants to the plaintiffs was assessed at RM6.6 million being the value of the property less 20% due to the status of a forced sale by tender, less a further 10% for the plaintiffs' failure to participate in the tender bidding, and finally less the sale price of RM15 million. The defendants were further liable for interest at the rate of 4% from the date of filing of the suit until final settlement, plus costs (see paras 44 and 45).

[**Bahasa Malaysia summary**

Plaintif ketiga telah mendapat pinjaman sebanyak RM5 juta daripada Malayan Banking Bhd bagi tujuan pembinaan sebuah hotel di atas sebidang tanah, yang mana tanah dan hotel tersebut ('hartanah tersebut') dicagarkan kepada

bank sebagai cagaran. Kegagalan plaintif ketiga untuk membayar kemudiannya telah menyebabkan pinjaman itu menjadi pinjaman tidak berbayar di mana akaun dan cagaran dipegang oleh defendan ketiga ('Danaharta'). Plaintif sebelum itu telah memasuki satu perjanjian jual beli bagi saham dalam defendan ketiga di mana mereka telah memperolehi tiga laporan penilaian yang berasingan bagi harta tersebut yang menilainya pada RM42juta, RM43 juta dan RM43 juta masing-masing. Bagi tujuan untuk melengkapkan jualan, pembeli dikehendaki untuk menyediakan satu jaminan bank tanpa syarat dalam masa 30 hari daripada 12 Julai 2000. Pembeli telah gagal untuk berbuat demikian dan perjanjian tersebut akhirnya telah dibatalkan pada 12 Ogos 2000. Pada 24 Julai 2000 Danaharta telah melantik defendan pertama dan kedua sebagai Pentadbir Khas (PK) bagi plaintif ketiga. PK telah memperolehi laporan penilaian bagi harta tersebut di mana ianya dinilai sebanyak RM16.3 juta dan RM19.8 juta. PK kemudiannya mengiklankan jualan harta tersebut secara tender daripada 11 Oktober 2000 hingga 15 November 2000. Plaintif pertama dan kedua telah memohon untuk melanjutkan masa bagi melengkapkan transaksi perjanjian jualan daripada PK yang kemudiannya telah menolak permohonan tersebut. PK telah meneruskan tender dengan menerima bidaan tertinggi sebanyak RM15 juta daripada Naza Properties Sdn Bhd, Pencelah (Intervener) bagi tindakan sivil ini, dan kemudiannya telah melengkapkan jualan tersebut. Plaintif telah mengambil tindakan terhadap Danaharta dan PK bagi ganti rugi dan kerugian yang dialami.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut') telah mengenakan satu kewajipan untuk bertindak dengan suci hati terhadap defendan-defendan dalam menjalankan tanggungjawab mereka (s 71 Akta tersebut). Tanggungjawab defendan pertama dan kedua dalam kapasiti mereka sebagai pentadbir khas adalah sama dengan tanggungjawab pemegang gadaian kepada penggadai harta untuk bertindak dengan suci hati bagi tujuan spesifik untuk membolehkan harta dalam cagaran atas hutang itu dijaga dan direalisasikan bagi tujuan untuk mendapat pembayaran balik hutang tersebut (lihat perenggan 41); *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] 3 All ER 626 diikut. Lagipun, pemegang gadaian mempunyai tanggungjawab yang ketat untuk mengambil langkah yang sewajarnya untuk mendapatkan nilai sebenar bagi harta tersebut pada masa jualan dan dikehendaki untuk bertindak dengan suci hati kecuali apabila terdapat bukti salah laku yang disengajakan oleh pencagar, tanggungjawab untuk bertindak dengan suci hati tidak diluaskan bagi merangkumi setiap langkah yang mungkin diambil oleh seorang ahli kewangan yang altruistik tanpa mengira masa, kos atau usaha (lihat perenggan 42). Apabila sesuatu pihak berkuasa diberikan kuasa mutlak, pihak berkuasa itu perlu menggunakan kuasa tersebut dengan terkawal kerana mahkamah tidak mengakui penggunaan kuasa secara mutlak (lihat perenggan 45).

(2) Akta tersebut tidak menjejaskan hak milikan yang kukuh seseorang itu iaitu harta seseorang itu tidak sepatutnya dirampas kecuali dengan cara yang sah di sisi undang-undang (lihat perenggan 34).

(3) Defendan-defendan diberikan kekebalan daripada tindakan sivil dengan syarat tiada salah laku yang disengajakan atau kecuaian melampau dalam menjalankan tanggungjawab mereka (lihat perenggan 33).

(4) Dengan mengabaikan laporan penilaian yang diperolehi oleh plaintif, menahan kebenaran bagi lanjutan masa untuk perjanjian jual beli plaintif, menerima bidaan tender bernilai RM15 juta sebagai harga jualan bagi tender tersebut, dan seterusnya membuat bayaran bagi agen hartanah, peguamcara dan juga bagi khidmat mereka sendiri, pentadbir khas tersebut telah bertindak secara tidak jujur dan tidak menghiraukan dan secara sengaja telah mengakibatkan kerugian kepada plaintif-plaintif. Fakta-fakta secara kumulatif menunjukkan kecuaian melampau dan secara sengaja oleh pentadbir khas sehingga hampir merupakan penipuan terhadap plaintif-plaintif dan oleh itu defendan-defendan adalah bertanggungjawab terhadap plaintif-plaintif (lihat perenggan 43).

(5) Nilai ganti rugi yang perlu dibayar oleh defendan-defendan kepada plaintif-plaintif dinilai sebanyak RM6.6 juta iaitu nilai bagi hartanah itu setelah ditolak 20% akibat daripada status jualan paksaan melalui tender, ditolak seterusnya 10% atas kegagalan plaintif-plaintif untuk mengambil bahagian dalam bidaan tender, dan akhir sekali ditolak harga jualan iaitu RM15 juta. Defendan-defendan selanjutnya adalah bertanggungjawab ke atas faedah pada kadar 4% daripada tarikh pemfailan tindakan sehingga penyelesaian akhir, ditambah kos (lihat perenggan 44 dan 45).]

Notes

For a case on adequacy of consideration in a sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3689.

Cases referred to

Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor [1993] 3 All ER 626 (folld)
Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1 (refd)
MBB v Lim Poh Ho [1997] 1 MLJ 662 (refd)

Legislation referred to

Federal Constitution art 8(1)
Pengurusan Danaharta Nasional Berhad Act 1998 ss 4(1)(a), 25, 66(1), 66(2), 71, 72, item 5 2 Second Schedule

Mohd Ismail (John Khoo and Sunny Khoo with him) (Ismail, Khoo & Associates) for the plaintiffs.

V Vijakumar (Albar & Partners) for the first and second defendants.
Tommy Thomas, (Adrian Gomez with him) (Tommy Thomas) for the third defendant.
Mohd Noh bin Nasira (Nasira Aziz & Co) for the Intervener.

Mohd Noor Abdullah J:

[1] The first and second defendants are the special administrators appointed by Pengurusan Danaharta Nasional Bhd, the third defendant ('Danaharta'), to administer the third plaintiff.

[2] Naza Properties Sdn Bhd, the intervener, was the successful bidder of the tender which bought the third plaintiff for RM15 million.

BRIEF FACTS

[3] The third plaintiff obtained credit facilities of RM5 million from Malayan Banking Bhd to build a hotel on its land and as security thereto, the third plaintiff charged the land and the hotel to the bank. However, the third plaintiff failed to repay the loan and it became non-performing. As a result, the loan account and the charge were vested in Danaharta. On 24 July 2000 Danaharta appointed the special administrators to administer the third plaintiff.

[4] Earlier, on 12 July 2000 the first and second plaintiff entered into an unconditional bank guarantee within 30 days of the execution of the sale and purchase agreement ('SPA'). The purchaser failed to procure the bank guarantee on 12 August 2000 and thereby the SPA was deemed terminated on that date.

[5] On 24 July 2000 Danaharta, in the exercise of its powers under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), appointed the first and second defendants as special administrators to administer the third plaintiff. Within three weeks the special administrators obtained a valuation report from Vigers (KL) Sdn Bhd which valued the hotel at RM16,340,000. The special administrators advertised the sale of the hotel by tender from 11October 2000 until 15 November 2000. There were three bidders for RM6 million, RM10 million and RM15 million and the special administrators sold the hotel to the highest bidder for RM15 million, namely the intervener in this action. The intervener paid the full price of RM15 million and completed the sale and entered into vacant possession of the hotel on 31 March 2002.

THE MARKET VALUE

[6] The plaintiffs produced three valuation reports by:

(1) Henry Butcher for RM42 million dated 8 January 2000;
(2) NB Valuer for RM43 million dated 30 December 2000; and
(3) CA Lim for RM43 million dated 31 January 2001.

[7] Whereas the defendant produced one yaluation report for RM16.3 million and RM19.8 million dated 16 August 2000.

[8] The hotel was sold for RM15 million on 15 November 2000. The plaintiffs' valuers valued the hotel for the purpose of intended sale, for a fair asking price and for sale respectively; whilst the defendants' valuer, was for the purpose of disposal.

[9] The plaintiffs' valuers applied the comparison method and the depreciated replacement cost method whilst the defendants' valuer applied the discounted cash flow method and the cost method on a break-up basis.

(1) The Comparison Method

[10] This valuation approach entails comparing the hotel with similar properties that were sold recently and noting as well as making appropriate adjustments on the characteristics, merits and demerits of those properties in order to arrive at the value of the hotel.

[11] Henry Butcher made a market observation of the supply of Hotel rooms in Penang at 12,123 rooms which they said needed to lower the room rates in order, to generate more demand for hotel accommodation during the major tourist drawing events such as Visit Penang Year, Penang International Film Festival, Food Festival, and Shopping Carnival. The room rates for 27 hotels in Penang are between RM100 to RM5,000 per room and the occupancy rate is between 40% to 80%. Henry Butcher compared the sale transaction of five hotels in Penang and in particular Park Inn International Hotel for RM44 million (RM220,000 per room) in 1994 which is six years earlier in time.

[12] NB compared the hotel with four comparable hotels which are within 1/2 km to 2 km from the hotel but their beach fronts are not as good. Thefour hotels are:

(i) Paradise Tanjong Bungah (RM125–RM145 — 70%)

(ii) Copthorne Orchid (RM155 — 70%)

(iii) Paradise Sandy Bay (RM172 — 70%)

(iv) Crown Prince (RM158 — 70%)

[13] The room rates are for Standard Double Bedroom. NB also adopted the SPA of the Hotel itself at RM42 million on 12 July 2000 as evidence of market value.

[14] CA Lim in applying the comparison method did not compare the hotel with any particular comparable hotel. They however noted that the price of rooms of three or four or five stars hotel situated in the vicinity of the hotel ranges from RM280,000 to RM420,000 per unit. On that basis the fair asking price of the 126 rooms hotel is RM43 million.

(2) The Depreciated Replacement Cost (DRC)

[15] DRC basis of valuation requires an estimate of the market value of the land in its existing use and an estimate of the new replacement cost of the

building and other side works, from which deduction may be required for age, condition, functional obsolescence and other factors which result in the existing property being worth less than a new replacement. It is usual for DRC valuation to include acquisition costs relating to the land and fees, finance costs and caring charges relating to the buildings and other side works where those are capitalised by the undertaking.

[16] Henry Butcher described the land as rectangular in shape approximately 2,282.26 sq meter or 24,566 sq ft. The building is 12-storey hotel with 126 rooms with a seafront. Henry Butcher surveyed the development costs of five hotels of which Park Inn International was transacted at RM220,000 per room, Bayview City at RM184,357 per room and Berjaya Georgetown at RM175,000 per room.

[17] NB valued the hotel at RM43 million as follows:

(i)	Cost of land — 24,566 sf x RM200	= RM 4,913,200
(ii)	Cost of building — 97,393 sf x RM250	= RM24,348,250
(iii)	Furniture, fixtures and installation etc less 10% of depreciation	= RM14,130,000
	Total	= RM43,391,450

(3) The Discounted Cash Flow

[18] This method which is used only by the defendant's valuer, entails determining the gross revenue over a 10 year period and deducting all operating and overhead expenses to arrive at the net income and capitalising the net income at an appropriate return to arrive at the market value of the hotel. The projected occupancy rate of the hotel is based, on six hotels in the vicinity which averaged between 60% to 70%. As the hotel is not operational, the projected occupancy rate is 65% to increase to 80% in 10 years time. The projected room rate of the hotel is RM95 per room and to gradually improve to RM220 in 10 years' time. This is based on the published room rate of three hotels in the vicinity. Food and Beverages sales are estimated at 40% of the room rate. Other income from laundry, excursions, tours etc. make up 5% of the room rate. Less operating cost, administration and general expenses, salaries, maintenance, advertising etc, the estimated market value of the hotel as a going concern is RM16,340,000 or RM129,683 per room.

[19] The defendant's valuer adopted a second method using the cost method to value the land and building on a break-up value. Their value is as follows:

(i)	Land	= RM 5,405,000
(ii)	Building	= RM13,135,000
(iii)	Fixtures and Fittings	= RM 1,314,000
	Total	= RM19,854,000

[20] This value is based on the sales of (i) 3.4 acres of land in Jalan Farquhar which was sold for RM26.6 million in September 1999; (ii) 28,071 sq ft of land at Tanjong Tokong which was sold for RM5.2 million in October 1999; and (iii) 41,695 sq ft of land in Tanjong Bungah which was sold for RM7.9 million in June 2000.

(4) Observation and Conclusions

[21] PW1 from NB Valuer is a chartered valuation surveyor with 41 years experience of which 30 years was with the Penang Municipal Council compared to DW3 from Vigers who is based in Kuala Lumpur and admitted that he did not inspect the hotel nor verify the cost of furniture and fixtures from receipts or other documents. Hence a colossal difference of RM12 million and RM1.3 million for the cost of furniture and fixtures.

[22] NB estimated the cost of land at RM200 per sq ft x 24,566 sq ft = RM4,913,200. CA Lim estimated the cost of land at the same price RM200 per sq ft x 24,566 sq ft = RM4,913,200. Vigers estimation was no less at RM5.4 million for the cost of land. Therefore on the basis of compatible values by all the valuers I conclude that the cost of the land (and hotel) is RM5 million.

[23] NB estimated the cost of the building at RM250 per sq ft x 97,393 sq ft = RM24,348,250. PW1 of NB confirmed that the audited account of the hotel showed that the cost of building was RM13.5 million but he disagreed with it and it did not influence his valuation. CA Lim estimated the cost of the building at RM180 per sq ft x 97,393 sq ft = RM17.53 million. PW3 of Henry Butcher estimated the cost of the building at RM23 million, derived from RM37 million — RM14 million for fixtures and fittings. Vigers estimated the cost of the building at RM13.1 million which is equivalent to RM132 per sq ft. I rejected Vigers' estimation of RM13.1 million which is even less than the audited account of the Hotel in 1999. Viger's valuation of RM132 per sq ft, compared to NB's valuation of RM250 per sq ft and CA Lim's valuation of RM180 per sq ft, is manifestly undervalued. Vigers' valuation of RM13.1 million is almost half the valuation of NB's value of RM24.3 million and Henry Butcher's value of RM23 million. I find CA Lim's value of the cost of the building at RM1.53 million not unreasonable. However my own analysis and conclusion from the facts established fairly set the cost of the building of the Hotel at RM200 per sq ft x 97,393 sq ft = RM19.47 million. To this I add RM1.5 million for lifts, fire fighting equipment and other installations.

[24] NB estimated the cost of furniture and fixtures, fire-fighting equipment, installation, air-condition plant and lifts at RM14.1 million. CA Lim did not specifically value the furniture and fixtures. Henry Butcher also did not value them.

[25] Vigers valued the fixtures and fittings at RM1.3 million.

[26] In my view fire fighting equipment, installations, air-condition plants and lifts are parts of the building. They are not furniture, fixtures and fittings.

I have considered that NB's value is verified unlike Vigers' value. The hotel was not operational for five years and hence the furniture and fixtures were unused or neglected. They are however fit and presentable for a two star hotel. I noted the photographs shown in Henry Butcher's valuation report in January 2000 and in CA Lim's valuation report in January 2001. I concluded that the value of the furniture and fixtures are RM4 million.

[27] Accordingly the true market value of the Hotel in my estimation and findings on the facts established is as follows:

(i)	Cost of land	= RM 5 million
(ii)	Cost of building	= RM20.97 million
(iii)	Cost of furniture & fittings	= RM 4 million
	Total	= RM29.97 million

[28] I find the comparison method and the depreciated replacement cost method applied by the plaintiffs' valuers more appropriate and relevant than the discounted cash flow method applied by the defendants' valuer. The former is more accurate. The latter assumed that the hotel is operational, that the room tariff and the occupancy rate are so much that the projected income for 10 years is so much, less all sorts of expenditure. The assumption that Penang Bridge benefited the hotel is now proven wrong. The terror strikes, SARS, tsunami and travel advice are unforecasted demerits. The valuer himself admitted that there was no history of earning and no stream income to support the projected room tariffs and occupancy rate, and the projected multitude of expenditure. I therefore reject the defendants' valuers method of valuation.

[29] The defendants' valuer breached the statement of Standard 6.1.0 of the Malaysian Valuation Standard which states that a proper inspection and referencing of property is fundamental to the valuation process. Valuers are expected to carry out an adequate inspection and referencing of the property which is to be valued, collecting and collating all relevant data about the property to enable them to arrive at a reasonable valuation.

FUNCTIONS OF DANAHARTA AND SA

[30] Danaharta has power to manage, finance and dispose of the assets and liability of the hotel (s 4 (1)(a) of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act')) and where the hotel is unable to fulfil its obligations to its creditors, Danaharta may recommend the appointment of a special administrator to administer the hotel provided that to do so would serve public interest (s 25 of the Act).

[31] The special administrator has power to sell or otherwise dispose of the assets of the hotel by public auction or private contract (item 5, Second Schedule of the Act).

[32] Danaharta and the Special Administrator must act in good faith and any breach of the law by them does not invalidate any act done by them in good faith (s 71 of the Act).

[33] Danaharta is immune from any suit for loss or damage in respect of any act done or omitted to be done by them in good faith in the performance of their function (s 66(i) of the Act). Whereas the special administrator is equally immune except where the loss or damage is due to his wilful misconduct or gross negligence (s 66(2) of the Act).

[34] Let it be said forthwith and forthright that the all empowering Pengurusan Danaharta Nasional Berhad Act 1998 does not derogate from the entrenched proprietary right of a person that he shall not be deprived of his property save in accordance with the law (art 8(1) Federal Constitution). The Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 held that s 72 of the Act prohibits a court from, *inter alia*, granting an injunction against the respondent and that means the respondent enjoys blanket immunity from injunctive relief. It follows that s 72 is contrary to the rule of law housed with art 8(1) of the Federal Constitution.

SPECIAL ADMINISTRATORS' ACTS AND OMISSIONS — WHETHER WILFUL OR GROSSLY NEGLIGENT

[35] The special administrators knew of the SPA of the shares in the Hotel for RM42 million and yet when Vigers submitted to him a valuation of RM16.3 million, the special administrators ignored the estimated value of RM42 million or thereabout. The special administrators are not only incompetent but had totally disregarded the consequential loss of some millions, not thousands of Ringgit Malaysia to the plaintiffs.

[36] The purchaser of the hotel failed to furnish the bank guarantee on 11August 2000, the due date. The plaintiffs applied on 18 August 2000 for extension of time to the special administrators until 15 September 2000. On18 September 2000 the special administrators granted an extension. On15 September 2000 the purchaser failed again because 'the Treasury Department had not given the final clearance although Bank Negara had cleared the Bank Guarantee' (p 6 ABD). The plaintiffs applied for extension to the special administrators until 10 October 2000 (p 7 ABD) 'for purchaser to arrange for the transfer of funds .... he is a genuine buyer — and kindly defer your public tender'. (p 8 ABD). On 1 November 2000 the plaintiffs pleaded directly to Danaharta for deferment of the public tender. Danaharta and the special administrators ignored their pleas. The hotel was sold on 15November 2000.

[37] On the facts of the case, their plea and the reasons for deferment of the tender were justified. The special administrators had wilfully withheld the extension of time and proceeded in haste with total disregard of the consequences. Why the hurry? The special administrators have power to cancel or suspend

the tender without assigning any reason (cl 7.7 Information Memorandum). It is only three months since their appointment.

[38] When the tender closed on 15 November 2000 there were three bidders for RM15 million, RM10 million and RM6 million. The Special Administrators sold the hotel for RM15 million because it is the highest bid.

[39] In my view the special administrators are not only dishonest; they wilfully caused loss to the plaintiffs. RM15 million is the highest compared to RM6 million and RM10 million but it is the lowest compared to RM20 million and RM26 million. And if anyone says he is a fool who bid for RM26 million, then he is a bigger fool not to see that the RM6 million tadpole makes the RM10 million toad looks bigger and the RM15 million frog looks biggest. Surely the tadpole can only dream to buy a 12 storey hotel for RM6 million. He bids to serve a purpose. I ask not for forgiveness for my unusually injudicious and intemperate language, it's a travesty of justice, expressed. The special administrators are not bound to accept the highest tender or any tender nor provide any explanation (cl 7.8(iii) Information Memorandum). The special administrators knew this but they turned their eyes away from it.

[40] For the highest tender price of RM15 million the special administrators must know that the plaintiffs get nothing, but they made sure that the successful bidders' estate agent gets his fees of RM320,250, the lawyer gets his legal fees of RM188,000 and the special administrators themselves their fees of RM279,000. I describe this act of the special administrators as scavenging on the plaintiffs. I wonder at the type of service the estate agent provides for a fat fee of RM320,250 paid out from the plaintiffs' account.

LIABILITY OF DANAHARTA/SPECIAL ADMINISTRATORS

[41] The Privy Council held in *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] 3 All ER 626 that a mortgagee owed a duty to the mortgager of the property to act in good faith for the specific purpose of enabling the assets comprised in the security for the debt to be preserved and realised for the purpose of obtaining repayment of the debt. Lord Templerman said 'Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and secondly, that a security for the payment of a debt is only a mortgage. From these principles flowed two rules, first, the powers conferred on a mortgagee *must be exercised in good faith* for the purpose of obtaining repayment and secondly that subject to the first rule, powers conferred on a mortgagee may be exercised although the consequence *may be disadvantageous to the borrower*'. (Emphasis added.) Their Lordships found on the facts of the above case that both the defendants had acted in breach of their duty to act in good faith particularly the second defendant in carrying out his receivership for improper purpose and in bad faith ultimately verging on fraud.

[42] At home the Court of Appeal in *MBB v Lim Poh Ho* [1997] 1 MLJ 662 held that the bank (the chargee) had a narrow duty to take reasonable precautions to obtain the true value of the property at the time of sale and was required to act in good faith but unless there was evidence of deliberate or wilful misconduct on the part of the Bank, the duty to take reasonable precaution would not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost or effort.

[43] The facts of this case as I found it, revealed that the special administrators knew of the agreement to sell the hotel for RM42 million, that the special administrators intentionally withheld an extension of time, that Vigers submitted a valuation report to special administrators four days after the aborted sale, that the special administrators sold the hotel within 3 1/2 months of their appointment, that the highest bid was propped up. The special administrators had committed misconduct by not fixing the minimum tender price, by not rejecting the three under-valued tender, by scavenging RM787,000 pay-off leaving nothing to the plaintiffs. (The first plaintiff is 74 years old). Cumulatively the special administrators' acts and omissions are wilful or are otherwise grossly negligent bordering on fraud against the plaintiffs. Accordingly I hold the special administrators and Danaharta liable to the plaintiffs for the loss and damage suffered by them.

LOSS AND DAMAGES

[44] Earlier I have analysed and found that the true market value of the hotel is RM30 million (RM29,970,000). Coincidently this value is a fair bargain price between the plaintiffs valuation of RM43 million and the defendant's valuation of RM19 million which is RM31 million. ((RM43 million + RM19 million) / 2 = RM31 million). Sale by tender is a forced sale and is normally reduced by10%–20%. Now less 20%, the forced sale value of the hotel is RM24 million. The plaintiffs failed to mitigate their loss by not participating in the tender. I reduce a further 10%. Finally the hotel should be sold for RM21.6 million or more. The special administrators sold it for RM15 million thereby incurring a loss of RM6.6 million to the plaintiffs. I therefore award RM6.6 million damages to the plaintiffs against the special administrators and Danaharta with interest at 4% from date of filing to date of settlement and cost. The defendant's counter claim is dismissed with costs.

[45] May I add in conclusion that whenever an authority is vested with absolute power, that authority must exercise the power with restraint because the courts are jealous of absolute power being exercised absolutely.

Plaintiffs' application allowed.

Reported by Kauthar Ali